PETITIONER'S BRIEF

JURISDICTION

The pleadings sound in tort upon a maritime collision on the Columbia River. The United States District Court of Oregon had jurisdiction under U.S. C.A. 28: 41 (3). The United States Circuit Court of Appeals for the Ninth Circuit had jurisdiction under U.S.C.A. 28: 225. This court has jurisdiction to grant certiorari under U.S.C.A. 28: 347.

ASSIGNMENT OF ERROR I.

The Circuit Court of Appeals erred in failing to vacate the decree of the District Court and to remand to that court for findings of fact and conclusions of law.

The case of *Panama Steamship Company v. Vargas* (C.C.A. 9) 33 Fed. (2d) 894, Reversed, 281 U.S. 670, was a suit in admiralty for an alleged rape of a young woman passenger by a steamship steward. The District Court wrote no opinion and made no Findings of Fact. As in the present case this Court described the Vargas evidence as conflicting and said:

> "This case belongs to that class where appellate courts refuse to review decisions of trial courts based on contradicting testimony taken before them."

The case went up on certiorari and the Supreme Court vacated both judgments below and remanded the case to the District Court to make specific Findings of Fact. The Supreme Court said:

> "The District Court delivered no opinion and made no findings of fact other than such as may be implied from the decree. The Circuit Court of Appeals described the evidence as conflicting, the plaintiff's case as not free from suspicion, and the defense as weak; and it then affirmed the decree on the stated ground that appellate courts refuse to review decisions of trial courts based on conflicting testimony taken before them, unless the record discloses some plain error of fact or come misapplication of the law.
>
> "Thus we have a case in which the evidence is conflicting—pronouncedly so according to the argument in this Court—and in which there has been no distinct finding of the facts by the court primarily charged with their determination. No doubt a finding of some kind is to be implied from the decree—a finding that would suffice as against a collateral attack. But the present attack is direct, not collateral. It is made in an appellate proceeding where the review, unlike that on a writ of error at law, extends to the findings of fact as well as to the rulings on questions of law. The decree does not show on what premise of fact it was given, but only that it was given on some premise which in the court's opinion entitled the plaintiff to the decree. The court may have regarded the evidence as showing seduction rather than rape and may have given the decree on the theory that the defendant was equally liable in either case. In the absence of distinct findings an appellate court cannot know how the questions of fact were resolved. The situation is much like that described in the following extract

from *Lawson v. United States Mining Co.*, 207 U.S. 1, 11:

"'It is insisted that the findings of the Circuit Court should have bound and concluded the Court of Appeals upon questions of fact. The difficulty with this contention is that there is nothing to show what the Circuit Court found to be the facts. Whatever might have been suggested by the course of the argument at the hearing, the comments of the court upon such argument, or in announcing its decision, there is nothing in the record to indicate whether its decision was based upon a question of fact or a matter of law. The record only contains its decree, dismissing the bill. All else is a matter of surmise, except as may be inferred from the allegations of the pleadings and the scope of the testimony. While it is apparent that the Circuit Court must have based its decision upon one of two or three grounds, yet upon which it is not certain.'"

In the Vargas case the District Court found one fact,—that the damage to the libelant was $10,000. In the case at bar the District Court found no fact at all.

The conclusion at bar (54)

"that the respondent was not guilty of any negligence proximately causing or contributing to said collision"

is obviously ambiguous as to whether the court considered the respondent not negligent or believed that its negligence was not proximate. In spite of this the Appellate Court treated this conclusion as a specific finding in favor of the respondent as to each and

all the charges of negligence made against the respondent, based upon a correct understanding by the trial court of all applicable rules of law. The Second Circuit was asked to make such an assumption in the *City of New York,* 54 F. 181, but answered:

> "We cannot for a moment assent to this proposition. How can a reviewing court know what questions of fact entered into the decision until it is informed what the judge decided as matter of law?"

May we add: And how can a reviewing court know what questions of law entered the decision until informed of the facts which the trial court took to be true.

This case is significant, not because a litigant has been denied recovery of some $50,000 of proved damages, but because a litigant has been denied recovery by two courts and has never been told why, in either an opinion, findings of fact, or conclusions of law.

A busy trial court has sloughed off his responsibilities to a busy appellate court and that court sloughed them off to limbo. Because the trial court wrote no opinion and made no findings the appellate court did not examine whether there was substantial evidence to support his findings. Without findings there was no way to tell whether the trial court's conclusions were right; therefore the appellate court assumed that the trial court was correct all along the line, both as to the facts and as to the law. Because the appellate court saw that a question of fact might

have been a basis for the decision, that court refused to look into the matter any further.

As the law is applied in this case a trial court which makes no finding and writes no opinion is in the strongest possible position before the appellate court. That court assumes that because the trial court said nothing, he must have thought correctly. The trial court made no misstatement because he made no statement at all.

On the other hand where a District Court applies itself to the case and studies the record and writes carefully prepared findings of fact and conclusions of law it is in a weaker position, because if a conclusion is incorrect the Circuit Court of Appeals will reverse.

It is hard to imagine a state of law more disastrous and unfair to litigants than this procedure. The Circuit Court of Appeals, because the District Court says nothing, accords him a favored position. If there is any question of fact in the case his decision is affirmed.

If Appellate Courts welcome, by ready affirmance, decisions with no findings and no opinions they will create a condition in which trial courts will give little consideration to their cases. The situation thus resulting will be intolerable; it will be destructive to the rights of litigants; it will make the position of the Supreme Court difficult because this court will be deluged with petitions like that in the case at bar in which the losing party did not get a fair trial.

Where careful opinions are prepared by trial courts and especially where they laboriously prepare their own findings, adequate consideration will be given to cases. Appeals to the Circuit Courts of Appeal will be directed to the application of principles of law to known facts. It is important to any system of justice that trial courts be required to make adequate findings of fact and should not be encouraged by easy affirmances to avoid making findings.

Let us look at the conclusion of the District Court to see how far it falls short of special findings of ultimate fact on the issues of the case. The conclusion is in two parts: (54)

> "The Court * * * now finds * * * (1), in favor of the respondent, and (2), that respondent was not guilty of any negligence proximately causing or contributing to said collision."

The first part is merely a statement that the Court favors the respondent. Such a finding would be necessarily implied in the decree.

Can any more be claimed for the second part? Broadly the conclusion includes an implied legal definition of negligence, a like legal definition of proximate cause, a finding of ultimate facts, and the application of these facts to these two legal concepts. The conclusion by its terms relates to the conduct of the respondent only, but suggests that the court may, without saying so, have imputed negligence and causation to either or both the libelant and the third party. Therefore as to them it also suggests implied

legal definitions of negligence and proximate cause, and the finding and application of facts thereto.

But this is not all; there are the separate issues to be considered.

The pleadings and pre-trial order charge the respondent with seven specifications of negligence. (Tr. 36-37) To exonerate the respondent justly the court must have exonerated it on each of these seven specifications of negligence. The Court's findings should include statements of ultimate facts covering the specifications of negligence charged against respondent, together with conclusions as to whether under the authorities the facts found constitute negligence, and if so, findings and conclusions on proximate cause.

Again, if respondent's negligence was not a proximate cause of the collision, either the collision was inevitable or somebody's negligence was a proximate cause. Since the Trial Court stated that he believed either that the respondent was not negligent or that its negligence was not proximate, (nobody knows which) the Court should have found either inevitability, if he believed that, or whose negligence was proximate. A finding of inevitability would not be within the issues made by the pleadings and the pre-trial order. If the Court wished to find inevitability he should have found the ultimate facts which he believed constituted inevitability, and should have stated that belief in a conclusion. Such finding and conclusion would then be open to legitimate attack in the appellate court.

It may be that the trial court thought the third party or the libelant was at fault, or that both were. The pleadings and pre-trial order (37-38) specified nine charges of negligence against each of these two parties. If the trial court thought any of these charges were well taken they deserved findings and conclusions.

The Supreme Court has always stood for adequate findings of fact. We invite re-attention to the vigorous opinion of Mr. Justice Brown in *The E. A. Packer,* 140 U.S. 360, and in the cases cited by him. The court will also recall *Tax Commission v. Jackson,* 283 U.S. 527, 533; and *United States v. Jefferson Electric Company,* 291 U.S. 386, 408-410; and *Interstate Circuits v. United States,* 304 U.S. 55; *Gibbs v. Buck,* 307 U.S. 66, 78; *Lawson v. U. S. Mining Co.,* 207 U.S. 1, 11.

In earlier days when trial *de novo* was more generally recognized in admiralty appeals, in those cases where District Courts failed to make adequate or any findings, Circuit Courts of Appeal supplemented with their own independent discussions of the evidence. *The Fullerton,* (C.C.A. 9), 211 F. 834; *Berwind-White Co. v. Fort Reading,* (C.C.A. 2) 282 F. 230, 232; *Stevens v. The City of New York,* (C.C.A. 2) 54 F. 181, *Mercurio v. Lunn,* (C.C.A. 2), 93 F. 592, 593.

Since the adoption of Rule 46½ the practice where the District Court fails to make findings is to remand the case for that purpose.

Edwards v. Holland Bank, (C.C.A. 8), 75 F. (2d) 713, 715;
Fitzhugh v. Smith, (C.C.A. 8), 97 F. (2d) 893, 896;
Siano v. Helvering, (D.C. N.J.) 13 F.S. 776;
Boss v. Hardie, (C.A. D.C.) 93 F. (2d) 234, 236.

The present case to the contrary notwithstanding, the Ninth Circuit has remanded for findings of fact.

National Popsicle v. Icyclair, (C.C.A. 9), 119 F. (2d) 799;
Perry v. Baumann, (C.C.A. 9) 122 F. (2d) 409.

The Second Circuit has several times stated the requirements for findings of fact and conclusions of law. In the case of *Matton Oil Company v. The Tug "Dynamic"*, (C.C.A. 2) 123 F. 999, in remanding to the District Court for findings and conclusions the court said: (1001)

> "We agree fully with the spirit and the terms of the resolution passed by majority vote of the judges at our Judicial Conference of last June recommending 'that the trial judge make brief, pertinent findings in respect to contested matters and file the same in connection with his opinion'. This puts the emphasis where it should be, namely, on brief and pertinent findings of contested matters; and also upon a finding made as a part of the judge's opinion and decision, rather than the delayed, argumentative, overdetailed documents prepared by winning counsel after the event which often appear in appellate records, though they are not effective aids to adjudication. See *Gibbs v. Buck*, 307 U.S. 66, 78, 59 S. Ct. 725, 732, 83 L. Ed. 1111; *Epstein v. Goldstein*, 2d Cir., 107 F. (2d) 755, 758. The findings and conclusions of the court, however, which actually led it to

decision are helpful; and we do not think trial courts will find it unduly burdensome to state those briefly and concisely at the time decision is made. Compare Otis, J., *Improvements in Statement of Findings of Fact and Conclusions of Law*, 1 F.R.D. 83, 85; Nordbye, J., Id., 1 F.R. D. 25, 31.

United States v. Forness, (C.C.A. 2), 125 F. (2d) 928, 942, involved a lease of Indian land. The court approved the above quoted language from the *Matton Case* and added the following:

(We omit footnotes)

"(21) We stress this matter because of the grave importance of fact-finding. The correct finding, as near as may be, of the facts of a law suit is fully as important as the application of the correct legal rules to the facts as found. An impeccably 'right' legal rule applied to the 'wrong' facts yields a decision which is as faulty as one which results from the application of the 'wrong' legal rule to the 'right' facts. The latter type of error, indeed, can be corrected on appeal. But the former is not subject to such correction unless the appellant overcomes the heavy burden of showing that the findings of fact are 'clearly erroneous.' Chief Justice Hughes once remarked, 'An unscrupulous administrator might be tempted to say 'Let me find the facts for the people of my country, and I care little who lays down the general principles.' That comment should be extended to include facts found without due care as well as unscrupulous fact-finding; for such lack of due care is less likely to reveal itself than lack of scruples, which, we trust, seldom exists. And Chief Justice Hughes' comment is just as applicable to the careless fact-finding of a judge as to that of an administrative officer. The ju-

diciary properly holds administrative officers to high standards in the discharge of the fact-finding function. The judiciary should at least measure up to the same standards.

"(22) It is sometimes said that the requirement that the trial judge file findings of fact is for the convenience of the upper courts. While it does serve that end, it has a far more important purpose—that of evoking care on the part of the trial judge in ascertaining the facts. For, as every judge knows, to set down in precise words the facts as he finds them is the best way to avoid carelessness in the discharge of that duty: Often a strong impression that, on the basis of the evidence, the facts are thus-and-so gives way when it comes to expressing that impression on paper. The trial court is the most important agency of the judicial branch of the government precisely because on it rests the responsibility of ascertaining the facts. When a federal trial judge sits without a jury, that responsibility is his. And it is not a light responsibility since, unless his findings are 'clearly erroneous,' no upper court may disturb them. To ascertain the facts is not a mechanical act. It is a difficult art, not a science. It involves skill and judgment. As fact-finding is a human undertaking, it can of course, never be perfect and infallible. For that very reason every effort should be made to render it as adequate as it humanly can be."

We submit that the failure of the District Court of Oregon to make any finding of fact and the failure of the Circuit Court of Appeals for the Ninth Circuit to remand the case to the District Court for findings affords to the Supreme Court the highest ground for the allowance of this petition, namely, the protection of litigants in their right to a fair trial.

ASSIGNMENT OF ERROR II.

The Circuit Court of Appeals erred in holding that with respect to the issue whether or not a proper lookout was maintained on board the Tug "Megler", the decision of the District Court should not be disturbed. The grounds of this assignment are that the District Court made no finding of fact on this issue and the evidence on this issue did not conflict.

The petitioner's flotilla consisted of the Tug "Star", Derrick Barge 10 and Barge 60, all owned by petitioner, together with the Tug "Lyle H", owned by the third party. The makeup and dimensions of this flotilla can be determined at a glance by examination of the blueprint, Exhibit 11, (Hansen 101). These barges were of the ordinary wooden kind in use locally. Derrick Barge 10 was equipped with a donkey engine, an A-frame and a crane for lifting heavy materials. Respondent's flotilla consisted of the tug "Megler", lashed directly behind Oil Barge 503, and pushing it. Barge 503 was 185 feet long, made of steel and carried its cargo below deck. At the time of the collision it was loaded with 300,000 gallons of gasoline.

The purpose of the trip of petitioner's flotilla from Portland to Vancouver and return was to deliver some gun carriages to a liberty ship at Vancouver. These were carried on Barge 60, and the derrick barge went along to lift them to the deck of the liber-

ty ship.

The night was dark, without a moon, and clear with a light wind from the east. It was moderately cold.

The reader will be interested in having before him the large chart, libelant's Exhibit 17, (Hansen 126), dated a couple of months before the collision, scale 1:5000. The collision occurred near the middle of this stretch of water. Derrick Barge 10 sank about three minutes after the collision. Its derrick fell across barge 60 and pinned it alongside. The place was located identically by two sets of engineers, by bearings taken with instruments. The sunken derrick barge and barge 60 are drawn to scale in red.

All of the testimony describing the navigation of the Tug Megler was given by Captain Rutschow of the Megler. As a witness Rutschow was adverse to the petitioner and was adverse to the third party. Neither the petitioner nor the third party attempted by any oral testimony or by any exhibit to contradict any part of what Rutschow said on this issue. Rutschow's testimony on this issue was clear and contained no "confusion". Rutschow testified without contradiction as follows: (233, 4, 8, 9; 241, 6, 7, 9; 250, 5)

Captain Rutschow was at the wheel, student pilot Moore (in military service at the time of the trial) was in the pilot-house and deckhand Gutzler was washing dishes in the galley. The regular pilot was

asleep and the other deckhand was below deck. *Nobody was on the barge.* Rutschow was explaining the lights to student pilot Moore. Ahead were the lights of Vancouver and the Highway and the railroad bridges. These lights were a little off the port bow. The starboard window of the pilot-house was open. Rutschow was in a position from which he could observe the lights from any vessel approaching from upstream. There was quite a reflection of lights in the water. Rutschow was talking to Moore as they went along about the lights on the river and navigation. The noise of the Megler's motors sounded in the pilot-house. The Megler and tow were travelling seven to ten miles per hour.

The "Megler" was pushing the oil barge ahead of the tug. The oil barge had a raised bow four and one-half feet above the water.

Captain Rutschow did not testify that he was either looking or listening for anything which might be coming from ahead, or that he was attempting to act both as the navigator and the lookout of the tug, nor did he testify that student pilot Moore was attempting to act as lookout. On the contrary he said that Moore was receiving instructions from him concerning the river lights.

This is all the testimony about the manner of lookout, or lack of lookout, kept on board the "Megler" up to the time of the collision. None of it was contradicted.

Moore's deposition was offered in evidence and objected to by the third party. The Court did not rule on the objection; (478-479) therefore the deposition was not received. Moore's deposition did not conflict with Rutschow's testimony.

Captain Rutschow gave the above testimony partly on direct and partly on cross-examination. No other witness disputed or contradicted any part of it, and there is no reason to disbelieve any of it.

The law applying to this state of facts is well known and has been frequently stated by the Ninth Circuit as well as by this and other courts. U.S.C.A. 33: 221, being Article 29 of the Pilot Rules for Inland Waters, provides:

> "Nothing in these rules shall exonerate any vessel, or the owner or master or crew thereof, from the consequences . . . of any neglect to keep a proper lookout."

We cite some of the leading authorities of this court and the Ninth Circuit in Appendix A to this brief. The principles laid down by these cases are that the lookout constitutes the eyes and ears of the ship. He must be a competent, reliable man and must be fully instructed upon his duties. He cannot be the master, mate, pilot or navigator of the vessel, because these officers have other duties and responsibilities. The lookout cannot be charged with any other duties than that of maintaining a proper lookout. The pilot house is not the place for a lookout to be stationed. He must be as far forward as possible and as

low to the water as possible considering all the circumstances.

There is no doubt about the conclusion of law to be drawn from the application of the above principles of law to the above uncontradicted facts. Captain Rutschow failed to cause a proper lookout to be maintained on board the "Megler". The only semblance of a lookout was kept by Rutschow himself and student pilot Moore. Rutschow had two other jobs to do at the same time. He was navigating the tug and tow and he was teaching Moore the lights on the river. Moore had another job to do, namely, learn the lights on the river. The front end of the barge was a perfect place for a lookout. The weather was calm and equable. A lookout on the front of the barge would have been more than 185 feet ahead of the Megler's pilot house. He would have no glass in front of him and would have no sound of the Megler's engine in his ears. He would not be talking or explaining the river to anybody, or listening to anybody talk. He could have devoted his eyes and ears to the job of getting the tug and barge and the 300,000 gallons of gasoline up the river safely.

Failure to maintain a lookout is proximate to any collision unless the navigator saw and heard everything a lookout could have seen or heard. (Appendix A) It therefore becomes of interest to determine what a lookout stationed in the front of the gasoline barge (if there had been such a lookout) might have seen and heard.

As the two flotillas approached the place of the collision, they were practically head on. Petitioner's flotilla was lighted as is shown in the cut. If the court will place Exhibit 11 upside down above the cut, the various lights shown on Exhibit 11 and on the cut will line up opposite each other. The light

at the far left of the cut was a kerosene lantern on the front right hand corner of the derrick barge. This lantern was closest of any of the lights to the water's edge. The next light some distance to the right and also close to the water's edge was a kerosene lantern carried on the front left hand corner of Barge 60. Next to the right is the green starboard light of the "Lyle H", on top of the pilot house, eleven feet above the water line. Next to the right on the cut appear three lights in a straight verticle line. They were the bow light and the two mast towing lights of the "Lyle H". Farthest to the right was the red port light of the "Lyle H".

The Tug "Star" was blanketed behind the engine house on the derrick barge and its running lights

were turned off so that they would not shine in the eyes of the navigator of the flotilla in the pilot house of the "Lyle H". (Hansen 105, 108) The steering was done on the Lyle. (Hallett 325) Where there are two tugs it is always the practice for one to do the steering. (Hansen 140)

In short there were seven lights visible from the front of petitioner's flotilla. This was the testimony of five witnesses, Hansen, Hallett, Hendren, Davis and Gill. A few of the numerous pages of the record in which testimony about these five lights can be found are as follows: kerosene lanerns serviced at Vancouver, 445-447, 102, 153, 104, 493, 355-357; position of lanterns marked on Exhibit 11, 475; Star's lights lighted with searchlights while leaving Vancouver, 105, 450, 354; Lyle's lights conformed with statute (Pilot Rules, Article 2, U.S.C.A. 33: 172-173), 354, 320-323; Davis cast off lines and avoided hitting lighted lantern with them, 77-79, 356, 85, 90-92; immediately after collision Hansen went upon derrick barge and saw right front light, 121-122; lantern came up from bottom with derrick barge three weeks later. (494)

The two kerosene lanterns on the front right corner of the derrick barge and the front left corner of Barge 60 accorded with the ancient custom on the Columbia River and not with Coast Guard Regulation Section 312.16 (Appendix B). By a war-time agreement between the Coast Guard and the Columbia River tug and barge operators, made because of

the difficulty in getting red and green electric lights, the effective date of Section 312.16 was postponed to January 1, 1945, two years after the collision. Written exhibits and oral testimony were offered by petitioner evidencing this agreement and postponement. The District Court reserved ruling on this offer (212) but never made the ruling.

If petitioner's flotilla had been lighted in accordance with Section 312.16 instead of in accordance with the Columbia River custom, there would have been two changes to note on the above cut. The lantern light far to the left of the cut being on the front right corner of the derrick barge would have been a green light shielded to show from directly ahead to two points abaft the starboard beam. The lantern light next to the right on the cut, being on the front left corner of Barge 60, would have been eliminated.

Captain Rutschow of the "Megler" testified concerning his first notice of petitioner's approaching flotilla. What he saw was a white light very close to the water, fifteen or twenty degrees off his port bow. (Rutschow 240, 241) This must have been one of the lanterns.

Shortly after the collision the skipper of a patrol boat, David J. Young, boatswain first class U. S. Coast Guard, visited the scene and Rutschow, Hallet, Hansen, Hendron and Young gathered in the pilot house of the "Star" and discussed the collision. (Young 438-440) All of these men quoted Rutschow as saying at that time that he did not see any of the

lights of petitioner's flotilla in time to avoid the collision but afterward he saw all of them. (Young 441; Hansen 535; Hallett 369-370; Hendron 460) Rutschow denied use of these exact words, (Rutschow 276-279) but did not deny having seen the lights.

Thus it appears without contradiction that the failure of Captain Rutschow to have a proper lookout stationed on the bow of the gasoline barge was a proximate cause of the collision because such a lookout might have seen the lights of petitioner's flotilla in time to have warned Rutschow at the wheel and thus have avoided the collision. (Appendix A)

Now let us consider the evidence as to whether such a lookout might have heard anything. Captain Hallett says that some time before the collision he sounded two whistles for a starboard to starboard passing without receiving an answer. (Hallett 344, 419-421) Hansen heard the two whistles and heard no answer, (145) Hendren likewise (452). Rutschow testified that he heard no whistles from petitioner's flotilla, but there was cosiderable noise from his own engine. (241-247)

There is no contradiction between this affirmative testimony by Hallett, Hansen and Hendren and Rutschow's negative testimony. There is no reason to believe that all four witnesses were not telling the truth. Nor is there any reason to believe that if a

competent lookout had been stationed at the forward end of the gasoline barge he would have head these two whistles and his warning might have enabled Rutschow to avoid the collision.

A little later when the vessels were practically in extremis Captain Hallett sounded a danger signal of three whistles and Rutschow signalled for a right hand turn of one whistle. We do not emphasize these later whistles except to say that there is no contradictory testimony regarding them.

So much for the record with respect to the failure of the "Megler" to have a lookout stationed in the front of the oil barge and on the proximateness of that neglect. There is no contradictory testimony whatever on these two issues. What the trial and appellate courts thought on them is unknown.

The Circuit Court of Appeals refused to discuss the facts relating to this issue and refused to pass on the questions of law having to do with the failure of the "Megler" to carry a lookout and the proximateness of this neglect. The basis of its refusal was the rule that where the evidence is conflicting and the witnesses have been heard by the District Court, the Circuit Court of Appeals will not set aside the findings of fact of the District Court unless they are clearly erroneous. Petitioner claims that this doctrine is mis-applied in respect to the issue above outlined

for the following reasons: (1) the District Court made no finding of fact, (2) the testimony on this issue was not conflicting.

"CLEARLY ERRONEOUS" DOCTRINE

We desire to examine briefly the doctrine that the Circuit Court of Appeals will not reverse a finding of fact made by the District Court on contradictory evidence unless the finding is clearly erroneous.

In earlier days when perhaps a smaller output of decisions was expected of District Courts and Circuit Courts of Appeals, the latter reviewed in detail the findings of fact of the former, and did not hesitate to reverse them when lead by the record to an opposite conclusion. This was especially true in admiralty where an appeal had always been held to be a trial *de novo*. We can hardly offer a better example of this disposition than the opinion of the Supreme Court in the *The Ariadne,* 13 Wallace 475, which reversed two lower courts on the facts.

As other examples of the earlier disposition of Circuit Courts of Appeals to review facts independently, we cite *The Kalfarli,* (C.C.A. 2), 277 Fed. 391, 398; *The Gypsum Prince,* (C.C.A. 2), 67 Fed. 612; *McCullough v. The Albany,* (C.C.A. 2), 81 Fed. 966, 968; *The E. H. Meyer,* (C.C.A. 9), 84 Fed. (2d) 496.

More recently, however, there has grown into great prominance the doctrine of non-interference

with the District Court's findings, where the evidence is in conflict and the District Court has had an opportunity to observe the demeanor of the witnesses. The Ninth Circuit cases cited in the opinion of the Circuit Court of Appeals in this case are examples of this non-interference doctrine.

These two doctrines,—trial *de novo* on the one hand, and support of District Court findings on the other, are plainly contradictory. The latter has all but abolished the former. The Ninth Circuit still gives lip service to the idea of trial *de novo; The E. H. Meyer,* (C.C.A. 9), 84 Fed. (2d) 496; *Lillig v. Union Stockyards,* 87 Fed. (2d) 277; *The Silver Palm,* (C. C.A. 9), 94 Fed. (2d) 754, 756. But the Second Circuit, with what we believe to be truer realism, recognizes the above conflict and concedes that almost the last vestiges of trial *de novo* have disappeared; *Petterson Lighterage Corp. v. New York Central,* (C.C. A. 2), 126 Fed. (2d) 992.

But we believe there must be a limit to the doctrine of non-interference with District Court findings. We think that limit is far exceeded in the present case, where the District Court made no finding of fact and the Circuit Court of Appeals refused to review the District Court's supposed belief on an issue going to the heart of the case on which the evidence is without contradiction or dispute.

On an issue where the evidence is not conflicting a finding thereon by the trial court, even though a finding in proper form and not a conclusion such as

we have in the present case, is not binding on the Appellate Court. In *Quinn v. Union Nat. Bank*, (C. C.A. 8), 32 F. (2d) 762, the court said: (763)

> "In view of the evidence not being conflicting we think the findings of the trial court are in no way binding upon us; that the case is open for full consideration, and it is our duty to determine from the record whether the facts as established justified the conclusion of the trial court."

In the case of *Brown v. United States*, (C.C.A. 3), 95 F. (2d) 487, 490, the Appellate Court set aside findings of ultimate fact by the trial court where the evidence was uncontradicted.

Bianchi et al. v. Vere, (C.C.A. 1), 17 F. (2d) 22, 25, the court said: (25)

> "The finding of the Supreme Court is based upon inferences drawn from uncontroverted facts, and therefore does not have the weight in this court that a finding of fact would have."

In conclusion we feel very strongly that a litigant who has been denied relief by two courts below without any findings of fact by either court and without an opinion by either court discussing the facts, has a just ground for petition to the Supreme Court. We respectfully submit that this case is altogether undistinguishable from the case of *Panama Mail Steamship Company v. Vargas*, 281 U.S. 670.

Respectfully submitted,

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APPENDIX A

The lookout constitutes the eyes and ears of the ship. Nothing shall exonerate a vessel or the owner or master thereof from the consequences of failure to keep a proper lookout.

Chamberlain v. Ward, 21 How. 548, 570.
The Sea Gull, 23 Wall. 165.
The Colorado, 91 U.S. 692, 699.

A proper lookout must be some competent person other than the master or helmsman. The lookout cannot be charged with any other duty than that of maintaining a lookout.

The Ottawa, 3 Wall. 268, 272.
The Genesee Chief, 12 How. 443, 462.
The New York v. Rea, 18 How. 223, 225.
The Pilot Boy, (C.C.A. 4), 115 F. 873, 875.
The Doris Dean, (C.C.A. 5), 135 F. (2d) 731, 732.
The Catalina (S. D. Cal.) 18 F. S. 461.
City of Philadelphia v. Gaviguin, (C.C.A. 3), 62 F. 617, 618.
Dahlmer v. Bay State Co., (C.C.A. 1), 26 F. 603, 605.
The Sea Breeze, (D. C. Me.), F. C. #12512a.
The Tillie (E.D. N.Y.) F. C. #14049.
The Montrose, (E.D. N.Y.) 47 F. S. 719, 724.
The Honan, (D.C. Wn.) 49 F. (2d) 749.

Pilot house not proper place in which to station a lookout.

The Albatross, (C.C.A. 9), 20 F. (2d) 17.

A lookout must hear as well as see.

Yamashita v. McCormick S.S. Co., (C.C.A. 9), 20 F. (2d) 25.

The lookout must be stationed as far forward as possible and close to the water.

The Prince Oskar, (C.C.A. 3), 219 F. 483, 488.
The Buenos Aires, (C.C.A. 2), 5 F. (2d) 425.
The Kaga Maru, (W. D. Wn.) 18 F. (2d) 295, 298.
The Sagamore, (C.C.A. 1), 247 F. 743, 754.
Eastern Dredging Co. v. Winnimissett Co., (C. C.A. 2), 162 F. 860, 861.

Where failure to keep a proper lookout is clearly proved to be a cause of disaster, a heavy burden is cast upon the ship on which it occurred which can be met only by clear proof of contributing fault.

The Ariadne, 13 Wall. 475.
The Oregon, 158 U.S. 186, 192, 197.
The Pennsylvania, 19 Wall. 125.
The Felix Taussig, (C.C.A. 9), 5 F. (2d) 612.
The Catalina, (C.C.A. 9), 95 F. (2d) 283.
Carr v. Hermosa Corporation, (C.C.A. 9), 137 F. (2d) 983.
The Denali, (C.C.A. 9), 105 F. (2d) 413.

The only class of collision cases where failure to maintain a proper lookout is not deemed proximate is where the navigator saw and heard everything that the lookout might have seen and heard.

Puratich v. U. S., (C.C.A. 9), 126 F. (2d) 914, 915.
Yamashita v. McCormick S.S. Co., (C.C.A. 9), 20 F. (2d) 25.
The Eagle, (C.C.A. 9) 289 F. 661.

APPENDIX B

PILOT RULES FOR CERTAIN INLAND WATERS

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(Section 312.16)

"Barges or canal boats towing alongside a steam vessel shall, if the deck, deck houses, or cargo of the barge or canal boat be so high above water as to obscure the side lights of the towing steamer when being towed on the starboard side of the steamer, carry a green light upon the starboard side; and when towed on the port side of the steamer, a red light on the port side of the barge or canal boat; and if there is more than one barge or canal boat abreast, the colored lights shall be displayed from the outer side of the outside barges or canal boats.

* * * * * * * * *

"The colored side lights referred to in these rules for barges and canal boats in tow shall be fitted with inboard screens so as to prevent them from being seen across the bow, and of such character as to be visible on a dark night, with a clear atmosphere, at a distance of at least 2 miles, and so constructed as to show a uniform and unbroken light over an arc of the horizon of 10 points of the compass, and so fixed as to throw the light from right ahead to 2 points abaft the beam on either side. The minimum size of glass globes shall not be less than 6 inches in diameter and 5 inches high in the clear."